

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

JILL BABCOCK,

Plaintiff,

vs.

Case No. 12-13010

STATE OF MICHIGAN and MICHIGAN  
STRATEGIC FUND,

Hon. Marianne O. Battani

**Defendants.**

/

MOTION TO DISMISS

BEFORE THE HONORABLE MARIANNE O. BATTANI  
United States District Judge  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard  
Detroit, Michigan  
Wednesday, March 19, 2014

## APPEARANCES:

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1           Detroit, Michigan

2           Wednesday, March 19, 2014

3           at about 3:19 p.m.

4                         - - -

5                         (Court and Counsel present.)

6                         THE CASE MANAGER: The Court calls Babcock vs.

7                         State of Michigan.

8                         THE COURT: Good afternoon. May I have your  
9                         appearances, please?

10                        MR. CHARARA: May it please the Court, Ali Charara  
11                         on behalf of the plaintiff.

12                        MS. GROSS: Good afternoon, Your Honor. Assistant  
13                         Attorney General Christina Grossi on behalf of the defendant.

14                        THE COURT: At some point I was told that you were  
15                         talking about settlement. Is that --

16                        MS. GROSS: That's correct, Your Honor.

17                        THE COURT: And are you still or no?

18                        MS. GROSS: We are still in the process of doing  
19                         that, yes.

20                        THE COURT: Okay. How close are you?

21                        MS. GROSS: We have recently conducted I think just  
22                         a few weeks ago --

23                        MR. CHARARA: Yes.

24                        MS. GROSS: -- a site visit with the plaintiff's  
25                         expert witness where they walked Cadillac Place Building, and

1       they are supposed to turn their report over to us, and then  
2       we will meet to see if we can agree to some of the findings  
3       in the report.

4                   MR. CHARARA: That report is complete, Your Honor,  
5       and sister counsel and I discussed that I will turn over the  
6       electronic files to her after court today.

7                   THE COURT: Okay. All right. This is the  
8       defendants' motion so you may proceed.

9                   MS. GROSS: Thank you, Your Honor. This is the  
10       defendants', State of Michigan and the Michigan Strategic  
11       Fund's, motion to dismiss. There are basically two grounds  
12       that the state is seeking dismissal of the entire complaint  
13       in relation to; the first is 11th Amendment immunity and the  
14       second would be standing, and I think those two defenses kind  
15       of overlap in application in this case.

16                  Plaintiffs have brought two claims under the ADA,  
17       one being under Title 1 -- excuse me, Title 2 and the second  
18       being under Title 3. It appears that during --

19                  THE COURT: This is Title 3 though, right?

20                  MS. GROSS: It appears during briefing that they  
21       have withdrawn Title 3, so we are left with the Title 2 claim  
22       and the claim that has been brought under the Rehabilitation  
23       Act.

24                  As to the Title 2 ADA claim, the state has asserted  
25       11th Amendment immunity. We've provided case law for the

1      Court as to the grounds for our immunity. I think most  
2      relevant in this case is probably the Popovich, the  
3      6th Circuit case, which talks about the differences between  
4      claims brought under an equal protection basis and those  
5      brought under due process.

6                 The complaint in this case is a little bit  
7      different because the plaintiff's grounds as pled in her  
8      complaint for her access to Cadillac Place are based on her  
9      employment with an agency that is housed in Cadillac Place.  
10     Normally you see employment claims brought under Title 1 but  
11    what she's done in this case is said well, I access Cadillac  
12    Place because of my employment but I'm bringing it under  
13    Title 2 because there are programs and services that Cadillac  
14    Place offers.

15                THE COURT: Now, what programs and services does  
16    she partake of?

17                MS. GROSS: I don't know any, Your Honor. There  
18    are none identified in the complaint. She essentially says I  
19    work for the Michigan Economic Development Corporation and  
20    therefore I go to Cadillac Place.

21                THE COURT: She doesn't allege anything like she  
22    can't get into the building or she can't use the restrooms or  
23    she can't --

24                MS. GROSS: She -- I think she generally -- I think  
25    it is fair to say she generally identifies building defects

1       that interfere with her equal access to Cadillac Place. One  
2       of the things she points out is parking, one of the things  
3       she points out is just some ramps, I think she might mention  
4       bathrooms in the complaint, but she doesn't tie those issues  
5       to any denial of services, which is part of our standing  
6       argument, which is to say under both the Rehabilitation Act  
7       and ADA, but certainly I think it is easier to identify in  
8       the Rehabilitation Act claim, you still have to point to some  
9       program or service that you are being denied access to in  
10      order to meet the standing requirement for suffering and  
11      injury, otherwise there is just kind of this amorphous well,  
12      I go to this building and, you know, there is an  
13      architectural defect and therefore you are violating the ADA  
14      and the Rehabilitation Act, and it seems to me both of those  
15      acts are premised on equal participation in a program or  
16      service.

17                  In terms of the ADA claim, the standing issue  
18      fleshes out a little bit more because when we asserted  
19      11th Amendment immunity because you can't bring an equal  
20      protection based claim the response was well, there is a  
21      courthouse inside Cadillac Place. Well, there is no  
22      allegation in the complaint that she has tried to access a  
23      courthouse and she has been denied access to a courthouse,  
24      that she is maybe a litigant in a proceeding or something of  
25      that nature; it is just well, there is a courthouse there.

1           Well, not only do we think that's not sufficient to  
2 pierce 11th Amendment immunity because we don't think that  
3 makes the claim sound in due process, but we are also saying  
4 you don't have standing for that type of claim because you  
5 haven't identified any injury relating to any access to the  
6 courthouse.

7           So those two issues in the ADA kind of flesh out,  
8 and with the Rehabilitation Act claim it is the same thing,  
9 we have said you haven't identified a program or service that  
10 you can access -- can't access. Obviously Cadillac Place  
11 houses lots of agencies, both private and public, there are  
12 many services that go on there. No injury has been  
13 identified with a particular service which causes concern  
14 because the Rehabilitation Act's waiver of 11th Amendment  
15 immunity is premised on a receipt of federal funds. Without  
16 the receipt of federal funds there is no basis to pierce the  
17 11th Amendment immunity.

18           So our response was well, you have to identify a  
19 program or service so we can determine, number one, that the  
20 state actually received financial funds -- or financial -- or  
21 federal money for that service to make sure we have waived  
22 11th Amendment immunity as to whatever you are alleging.

23           THE COURT: Well, do they allege here that the  
24 building is the program kind of thing?

25           MS. GROSS: Yes, that's essentially the response is

1       the building is the program. I don't think that that --

2           THE COURT: The federal funds issue is really  
3 secondary to this?

4           MS. GROSS: Yes, and they haven't -- essentially,  
5 yes, I suppose if you are going to argue that the building is  
6 the program then you would have to argue that we received  
7 money to buy the building but, yeah, they are essentially  
8 saying well, the building is the program. Well, our position  
9 is it is not a program, there are programs inside of the  
10 building, and I think the plain language supports that, and I  
11 think that you also find that there is case law that talks  
12 about the ability to provide access to a program by making  
13 accommodations. I know there's some case law, I'm not sure  
14 if it is referenced in the briefs, but there's some case law  
15 that talks about moving programs to other buildings to have  
16 access.

17           So I think to say just because the State of  
18 Michigan owns a building then, you know, anything that goes  
19 on must be compliant with the Rehabilitation Act, I mean,  
20 certainly if the State of Michigan owned a building where  
21 only employees were allowed I would argue, you know, there is  
22 no basis for either Title 2 or the Rehabilitation Act because  
23 there is no public access to that building. Maybe somebody  
24 could bring a Title 1 claim and say based on my employment  
25 I'm being denied equal opportunity and employment, but to say

1       well, just because the State of Michigan owns a building it  
2 has to comply with both of these acts, so those are the two  
3 bases.

4           I will say in response to the motion to amend  
5 essentially plaintiffs have said well, allow us to cure these  
6 defects if there are defects with the motion to amend.

7           THE COURT: They want to name individuals?

8           MS. GROSS: They want to name individuals, yes.

9           While that may cure an 11th Amendment challenge because  
10 Ex parte Young, our position is most of these issues are  
11 based on standing because the complaint is written so  
12 broadly, and an Ex parte Young action won't cure an Article 3  
13 standing problem. We have to have some injury that has been  
14 identified so the defendants can properly defend, and that's  
15 just not going to be cured by naming an individual defendant.

16           THE COURT: Title 2 is applied only against the  
17 state, right?

18           MS. GROSS: Title 2 would only be applied against  
19 the state.

20           THE COURT: So adding an individual what would that  
21 do for you?

22           MS. GROSS: I assume if they wanted to add an  
23 individual to try to say I'm bringing an Ex parte Young  
24 action against that individual in their official capacity,  
25 our position though is to bring a proper Ex parte Young

1       action that individual has to have some connection with the  
2       alleged claim, and I don't know how you would get there in  
3       this case.

4                 THE COURT: Okay. All right.

5                 MS. GROSS: Thank you, Your Honor.

6                 THE COURT: Let's hear the response.

7                 MR. CHARARA: Good afternoon, Your Honor.

8                 THE COURT: Good afternoon.

9                 MR. CHARARA: I'm going to start with the 11th  
10      Amendment immunity. Defense counsel and us both agree that  
11      under both the ADA and the Rehabilitation Act it is no  
12      question that Congress has expressly abrogated 11th Amendment  
13      immunity, so to talk about Popovich vs. Cuyahoga, yes, in  
14      that case the court was dealing with a Title 2 claim brought  
15      under the ADA, and in that case the court did note that the  
16      plaintiff there had a claim that was both a violation of the  
17      ADA and a violation of due process and so the court did that  
18      proper analysis and concluded that, yes, for purposes of that  
19      claim an 11th Amendment state immunity was validly abrogated  
20      by Congress. However, the court never indicated --

21                 THE COURT: Because due process was within the ADA  
22      violation in that case?

23                 MR. CHARARA: Yes, Your Honor, but the court never  
24      indicated that a due-process claim was necessary. In fact, a  
25      subsequent case by the United States Supreme Court, U.S. vs.

1      Georgia, found again that a Title 2 claim couched both  
2      14th Amendment and ADA violations within it, but the court  
3      did specifically state that where a claim alleges violations  
4      of the ADA but not violations of the 14th Amendment, it is  
5      within the discretion of the court to determine whether or  
6      not the claim may proceed. In other words, just because an  
7      ADA violation is not also a violation of the 14th Amendment,  
8      due process or equal protection does not stop the plaintiff  
9      from moving forward.

10                THE COURT: Well, that's what -- the 6th Circuit  
11      talks about that, though, right?

12                MR. CHARARA: Correct, yes, and as does the United  
13      States Supreme Court in the subsequent case.

14                Now, as for a due-process --

15                THE COURT: How do you distinguish that Popovich  
16      court test?

17                MR. CHARARA: Well, Your Honor, the Popovich court  
18      did create a test to say a due-process claim had to be  
19      present. In that case they were dealing with a due-process  
20      claim and held that because there was a due-process claim the  
21      claimant could move forward but did not address the issue of  
22      what would happen if there was not a due-process claim, which  
23      is why I speak about the subsequent U.S. vs. Georgia case  
24      where the Supreme Court held that where there is a  
25      due-process claim as well as an ADA violation claim, of

1 course the claimant can move forward, but specifically quoted  
2 and said that even if there is not the 14th Amendment claim  
3 and there is only an ADA claim it is still within the  
4 discretion of the trial court to determine whether the  
5 plaintiff can move forward with the claim.

6 THE COURT: But didn't it say that equal protection  
7 wasn't enough, that there had to be the due-process element  
8 to abrogate the --

9 MR. CHARARA: No, Your Honor, not in United States  
10 vs. Georgia. In United States vs. Georgia the Supreme Court  
11 stated that an ADA --

12 THE COURT: No, in Popovich.

13 MR. CHARARA: I'm sorry.

14 THE COURT: That's the 6th Circuit case.

15 MR. CHARARA: Yes. In Popovich, like I said, Your  
16 Honor, the Court held that in that case that the claimant did  
17 have a due protection -- a due-process claim and allowed the  
18 claim to move forward, but they weren't faced with an issue  
19 where the claimant did not have a due-process claim, that  
20 analysis was undergone in the U.S. vs. Georgia case that came  
21 after, and that's where the Supreme Court first touched on  
22 when a claimant is bringing a claim and has only an ADA  
23 violation but not a due-process violation, and the court said  
24 in those situations it is still within the discretion of the  
25 trial court to allow the claim to move forward, i.e., just

1 because there is no due-process claim doesn't mean the claim  
2 cannot move forward and does not mean that 11th Amendment  
3 abrogation by Congress is invalid.

4 Now, Your Honor, as far as the due-process  
5 violation is concerned, we have alleged in the complaint  
6 here, specifically in the complaint before any of this arose,  
7 that there are two courts within the Cadillac Place building,  
8 a workers' compensation --

9 THE COURT: But your client has no connection with  
10 the courts, she didn't say she had a case she couldn't get  
11 to?

12 MR. CHARARA: Your Honor, our client is a  
13 practicing attorney. That she didn't have any current  
14 business in the workers' compensation court or the Court of  
15 Appeals pending at the time of lawsuit was brought doesn't  
16 change the fact that she is an attorney and a member of the  
17 public who undoubtedly at some point in the future may have  
18 to use the workers' compensation court or the Court of  
19 Appeals especially as a practicing attorney.

20 THE COURT: What is the injury in fact here?

21 MR. CHARARA: The injury in fact is that she can't  
22 gain access to the building and that includes everything  
23 within the building.

24 THE COURT: She certainly gains access to get to  
25 work, right?

1                   MR. CHARARA: It is physically possible for her to  
2 enter the building, but the ADA doesn't state that just  
3 because it is physically possible to enter the building that  
4 the ADA is compliant. The ADA states that access has to be  
5 equal, and in these circumstance access is certainly not  
6 equal because plaintiff endures great difficulty to gain  
7 access to the building from the entrance ramps, from the  
8 parking structure and even day-to-day activities like  
9 attending the restrooms inside of the building.

10                  THE COURT: I don't see that in her complaint, I  
11 don't.

12                  MR. CHARARA: I'm sorry, Your Honor, if it was  
13 stated --

14                  THE COURT: It sounds like she is complaining for  
15 somebody else but not herself.

16                  MR. CHARARA: I'm sorry, Your Honor. If it was  
17 stated in more general terms in the complaint I can assure  
18 you the plaintiff herself struggles with these everyday  
19 activities to gain access to parking, from parking to the  
20 building, and then through the ramp into the building while  
21 she is in the building to access certain facilities such as  
22 the restroom. These are all also documented in our expert's  
23 report, which he has turned over to me today, which --

24                  THE COURT: But it is not in the complaint and I  
25 didn't know about, you didn't say she was an attorney, you

1 didn't say she practiced in that court, so she does appellate  
2 work also?

3 MR. CHARARA: No, Your Honor, not at this time, but  
4 she is a licensed attorney. And as far as the complaint  
5 goes --

6 THE COURT: Every licensed attorney who has a  
7 disability would not have a claim against that building?

8 MR. CHARARA: Your Honor --

9 THE COURT: You would have to practice there, you  
10 have to have an injury in fact?

11 MR. CHARARA: Yes, Your Honor, but we don't -- to  
12 start we don't need to narrow this case down to only access  
13 to the courts because the complaint doesn't only -- the  
14 complaint alleges unequal access to the building in general,  
15 her place of employment, the courts within the building,  
16 anything within the building. It doesn't change the fact  
17 that the building is owned and operated by these two  
18 defendants.

19 THE COURT: No, of course that doesn't change the  
20 fact, that's really not an issue.

21 MR. CHARARA: Yes, Your Honor. And the only reason  
22 the issue of the two courts in the building has been  
23 litigated so intensely for purpose of this motion is to get  
24 around 11th Amendment immunity because some courts have  
25 determined that if you have a due-process claim that you can

1      bypass 11th Amendment, but that is why when we stated that if  
2      that the Court holds that we need a due-process claim and  
3      further holds that we have not alleged a proper due-process  
4      claim then to name individual actors instead of the state  
5      would eliminate any 11th Amendment issue, and the reason is  
6      6th Circuit precedence clearly holds that if you are bringing  
7      a suit against individual state actors, not the state itself,  
8      and the suit is seeking declaratory or injunctive relief, not  
9      money damages like our suit is, then the 11th Amendment does  
10     not apply whatsoever. If the 11th Amendment does not apply  
11     to this case then there is no need to bring a due-process  
12     claim and the only claim that needs to be --

13                THE COURT: But doesn't Title 2, doesn't that only  
14     go against the state, that's one question? And then the  
15     other one says no qualified disabled person shall be excluded  
16     from participation in or denied the benefits of services,  
17     programs or activities. I would like that identified a  
18     little better.

19                MR. CHARARA: Okay. To answer your first question,  
20     Your Honor, yes, Title 2 applies to the state but not only  
21     the state, Title 2 applies to any public entity so that's  
22     any -- the state, any sub government underneath the state,  
23     any agency, any instrumentality of the state, they are all  
24     subject to Title 2.

25                Second of all --

1                   THE COURT: But not individually?

2                   MR. CHARARA: Your Honor, yes, an individual in  
3 their official capacity is also subject to Title 2.

4                   THE COURT: It is?

5                   MR. CHARARA: Yes, Your Honor. Title 2 applies to  
6 all government entities. If you are in your official  
7 capacity working for a governmental entity then you are  
8 subject to Title 2.

9                   THE COURT: What about Ex parte Young?

10                  MR. CHARARA: What about it, Your Honor?

11                  THE COURT: How does that apply to the individuals?

12                  MR. CHARARA: As far as amending our complaint to  
13 name individuals?

14                  THE COURT: Uh-huh, yes.

15                  MR. CHARARA: It is our position that if we amend  
16 our complaint to name individuals instead of the state then  
17 the 11th Amendment no longer has any applicability, it is out  
18 of the picture, and this becomes an ordinary ADA claim as if  
19 it were against any non-state defendant. Without the 11th  
20 Amendment hurdle in the way then you just have an ADA claim,  
21 and then the question becomes does the plaintiff's complaint  
22 allege an ADA violation, there is no need to look at whether  
23 it alleges a due-process violation under the 14th Amendment.  
24 That's why it is our position that if the Court finds that  
25 our complaint did require a due-process claim to survive

1       11th Amendment immunity and did not do that that we can name  
2 individual state actors and because our claim seeks only  
3 injunctive and declaratory relief the 11th Amendment would be  
4 of no applicability to this case and we could move forward on  
5 an ordinary ADA claim and not have to look at due process,  
6 Your Honor.

7                  THE COURT: Okay. Thank you. Reply?

8                  MS. GROSS: Just briefly, Your Honor. I think I  
9 should mention the Georgia case; I don't think it is  
10 applicable in this case. My reading of that case is that the  
11 Supreme Court is saying when a plaintiff wants to bring an  
12 ADA claim that is premised on a separate Constitutional  
13 provision but applicable to the states through the 14th  
14 Amendment's due-process clause you must prove a violation of  
15 that other Constitutional provision, an actual violation in  
16 order to bring it.

17                  In that case I think it was an 8th Amendment, cruel  
18 and unusual claim, and so the court was saying well, you are  
19 going to have to actually prove the 8th Amendment violation  
20 attributable to the states through the due process 14th  
21 Amendment, and that's what the discussion was there.

22                  In this case I don't think Georgia is relative  
23 because Popovich is directly on point and is still good law,  
24 and that says equal-protection-based claims are, you know,  
25 barred, and this is clearly an equal-protection claim. It is

1      not a claim where we are even getting to the due-process  
2      clause because there is no allegations in the complaint that  
3      implicate the due-process clause.

4                Also, just briefly, I think the Court's concerns  
5      and questions about the injury in fact are on point  
6      regardless of the fact that Ms. Babcock might be a licensed  
7      attorney. I honestly don't think she worked for her employer  
8      in that capacity, I don't think there is anything in the  
9      complaint about it, but nonetheless I still don't think  
10     that's sufficient to prove injury. I don't think I could sue  
11     the U.S. Supreme Court and say well, I'm an attorney and  
12     someday I might be there so do X, Y and Z.

13               THE COURT: Well, did you get anything from the  
14      complaint about -- let's say, parking or getting into the  
15      building that is personal to plaintiff?

16               MS. GROSS: I think the plaintiff -- it is hard  
17      because the complaint it almost appears that it could be a  
18      class action because it makes these allegations on behalf of  
19      her and other similarly -- I even think it uses the term  
20      similarly-situated individuals, so I can't distinguish  
21      between what actually has happened to her and what she is  
22      saying just the general public might encounter. I believe  
23      the parking issue is related -- is there and I can see  
24      because she worked at the building that might be an issue  
25      although the State of Michigan doesn't own parking, so it's

1       one of those things where there are things in the complaint  
2       where she might say, you know, a ramp affects me but it is  
3       difficult when you say I'm bringing this on behalf of myself  
4       and all similar-situated individuals, particularly in the  
5       ADA, because every handicap is different, every disability  
6       may relate to a different I guess building design defect or  
7       issue. For example, if I have a sight impairment, signage at  
8       the building is going to be an issue, but it doesn't affect  
9       me if I am a sighted individual in a wheelchair. So to just  
10      say all disabled individuals have trouble accessing Cadillac  
11      Place is just too broad to defend against. It needs to be,  
12      you know, I have this disability, I have suffered this injury  
13      because I can't access X, and that's just not in the  
14      complaint in this case, so that's why we were having some  
15      trouble when we responded saying it is 11th Amendment  
16      immunity but it is also standing because we can't identify  
17      what the issue is.

18                  THE COURT: Okay. What about doing away with the  
19      11th Amendment immunity by adding individuals --

20                  MS. GROSS: Well --

21                  THE COURT: -- in their official capacity?

22                  MS. GROSS: Under the Ex parte Young doctrine, it  
23      is difficult to say in a theoretical position whether or not  
24      that could be done because I will say I have made many  
25      challenges to 11th Amendment immunity or the Ex parte Young

1 doctrine when I see a plaintiff who just names an individual  
2 state defendant. For example, I am going to name the  
3 director of the Department of Corrections, I have brought  
4 challenges saying inherent in Ex parte Young is that official  
5 has some connection with the violation, that's the point of  
6 Ex parte Young, it is to strip the official of their cloak of  
7 immunity based on their bad conduct because the essence of  
8 Ex parte Young is that an officer of the state doesn't act  
9 illegally and if you are you don't get the 11th Amendment  
10 immunity.

11 So I don't know in this case who you could say is  
12 the relevant official for terms of her purported violations.  
13 I think what I said in the brief though is I don't even think  
14 we can get there because of the standing issue. So assuming  
15 she could allay the Article 3 concerns I guess I can't say  
16 that the state wouldn't want to bring another motion to  
17 dismiss saying the Ex parte Young official -- or the official  
18 you have named for purpose of Ex parte Young is not a proper  
19 defendant.

20 THE COURT: If Ex parte Young even applies in this?

21 MS. GROSS: If Ex parte Young applies, yes. So I  
22 guess I probably didn't address that in my brief and it was  
23 probably because I said you are not going to get there  
24 because you will not be able to cure the standing defect by  
25 just naming an official.

1                   THE COURT: Okay.

2                   MS. GROSS: Thank you, Your Honor.

3                   THE COURT: The Court -- I think they are very  
4 interesting issues here and it seems like the building has  
5 certain defects that needs -- may need, I don't want to  
6 prejudge this, may need to be fixed, but I don't know that we  
7 have the right plaintiff to fix those defects, so anyway the  
8 Court is going to issue an opinion on this. Thank you very  
9 much.

10                  MS. GROSS: Thank you, Your Honor.

11                  MR. CHARARA: Thank you, Your Honor.

12                  (Proceedings concluded at 3:42 p.m.)

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*CERTIFICATION*

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I, Robert L. Smith, Official Court Reporter of  
the United States District Court, Eastern District of  
Michigan, appointed pursuant to the provisions of Title 28,  
United States Code, Section 753, do hereby certify that the  
foregoing pages comprise a full, true and correct transcript  
taken in the matter of JILL BABCOCK vs. STATE OF MICHIGAN and  
MICHIGAN STRATEGIC FUND, Case No. 12-13010, on Wednesday,  
March 19, 2014.

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*s/Robert L. Smith*  
\_\_\_\_\_  
Robert L. Smith, RPR, CSR 5098  
Federal Official Court Reporter  
United States District Court  
Eastern District of Michigan

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Date: 08/14/2014

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Detroit, Michigan

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